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CLIENT ALERT

June 1, 2016

On May 11, 2016, the federal government enacted The Defend Trade Secrets Act of 2016 (DTSA) into law. Effective immediately, the misappropriation of trade secrets is governed under federal law, in addition to any existing state laws. Specifically, companies now have a federal cause of action to protect their trade secrets and receive damages and other remedies.

There are five major elements to the DTSA. First, the DTSA provides for remedies and a definition of trade secrets similar to those states that have adopted the Uniform Trade Secrets Act. All actions that are brought under the DTSA must occur within the three-year statute of limitations. Second, the DTSA allows for seizure of misappropriated trade secrets under extraordinary circumstances where there is a threat of imminent danger that the trade secrets will be destroyed or hidden if proper notice were given to the offending party. Seizure actions occur *ex parte*, i.e. without notice to the other party. Third, state law is not preempted which allows for companies to file an action and pursue remedies in either state or federal courts. This gives plaintiffs flexibility in enforcing their rights and protecting their interests. Federal claims may be brought in state court, however if done, then defendants have the right to remove the case to federal court. Fourth, injunctions are prohibited against former employees as an attempt to restrict them from entering new employment on the basis that they are knowledgeable about the company's trade secrets. This effectively abolishes the "inevitable disclosure" doctrine where certain courts granted companies injunctions based on the inevitable use of certain trade secrets by employee even if no disclosure has ever occurred. Finally, and most significant, employees are protected from the disclosure of trade secrets to government officials, their attorney, or the court where the purpose of disclosure was to either report their employer's violation of law or as part of an action against the employer for retaliation in a discrimination or harassment suit.

As part of the immunity provided to employees, employers must disclose this provision of the DTSA to its employees in any employment contract or non-disclosure agreement. A cross-reference to an employer's policy on whistleblowing which includes this disclosure will be sufficient to satisfy the notice requirement. Such disclosure is not limited to employees, as the DTSA defines an "employee" to include independent contractors and consultants. Failure to disclose the policy to employees will prevent the employer from obtaining exemplary damages or attorneys' fees.

Clients should conduct a review of all agreements, and specifically employment, consulting, and independent contractor agreements that include provisions for trade secrets and confidential information to ensure compliance with the DTSA. SSE&G can assist with updating your contracts and whistleblowing policies.

If you have any questions about the DTSA or these requirements, please contact:
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